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No. 88-880

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JULIUS TRUMP, *et al.*,

*Petitioners,*

v.

BERTRAM FIELD,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. *Where,* before trial, the District Court dismissed Plaintiffs' amended class action complaint, under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and

*Where,* the Second Circuit, accepting the allegations of the complaint as true, reversed on the law as to Plaintiff's Count I, Williams Act, § 14(d)(7) "best-price rule" claim, and remanded the case for trial:*

> *Question:* Should the Supreme Court, in the absence of a final decree, depart from its long standing tradition of denying petitions for certiorari to review interlocutory judgments of the Circuit Court of Appeals?

2. *Where,* the amended class action complaint alleges that a tender offeror signed a Merger Agreement with the target company, providing for a $22.50 per share tender offer, which was opposed by two dissident director shareholders, and

*Where,* the tender offeror issued a press release announcing the public tender offer, to be followed by the merger, and

*Where,* it is alleged that after 5:10 p.m. on the fourth business day thereafter: (a) the target's directors were advised that "in order to facilitate negotiations" with the two dissidents, the tender offeror was "withdrawing" the tender, but that the Merger Agreement remained in full force and effect, and (b) the tender offeror then issued a press release announcing the withdrawal "to facilitate the negotiations" and the negotiations with the dissidents, and

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* And the pendent state claims (A-4).

*Where,* it is alleged that late that same evening, the tender offeror simultaneously announced, by press release, a continuation of a "new" $23.50 per share tender-merger price, and a settlement with the dissidents which gave them—in addition to $23.50 per share—an option payment and fees and expenses amounting to a premium of $1.50 per share, or an aggregate of $25 per share; and

*Where,* it is alleged that the next morning the press releases announcing the "withdrawal" of the tender offer and the "new" $23.50 tender offer reached the public simultaneously:

*Question:* (a) Under SEC Rule 14d-2(b), in light of all of the circumstances, including that the Merger Agreement was still in effect, did the tender offeror's use of the label "withdrawal," effectively end the tender offer for purposes of the "best-price rule"?

*The Second Circuit said No.*

*Question:* (b) Is the applicability of the "best-price rule," solely determined by the tender offerors' use of the label "withdrawal" and "new" offer?

*The Second Circuit said No.*

*Question:* (c) Under the "best-price rule," is the mere announcement of a "withdrawal," inconsistent with deeming the tender offer not to have commenced, pursuant to Rule 14d-2(b), where the Merger Agreement providing for the tender is still in effect, the stated purpose of the "withdrawal" is to negotiate a private purchase, the private purchase is made within a few hours, and the press release announcing the "withdrawal" and the "new" price, reach the public simultaneously?

*The Second Circuit said Yes.*

*Question:* (d) Under the "best-price rule," was the increased price, with the Merger Agreement still in effect, part of a single plan of acquisition which may be treated as a single tender offer for purposes of the Rule?

*The Second Circuit said Yes.*

*Question:* (e) May a purported "withdrawal" of a tender offer, constitute a continuation of the offer, in light of the surrounding cicumstances?

*The Second Circuit said Yes.*

## LIST OF PARTIES

The parties before this Court are identical to the parties to the proceedings below, who were the Respondent, Bertram Field, and the Petitioners, Julius Trump, Eddie Trump, Stuart M. Sloan, Samuel N. Stroum, M. Lamont Bean, Fenwick Crane, E. Ronald Erickson, Calvin Hendricks, Robert B. Hutchinson, Earl W. Smith, Raymond C. Swanson, Pay'n Save Corporation, The Trump Group, Ltd., NLAC Corp., Aquicorp, Inc., Mergicorp, Inc., TGAC Corp., and TG Limited.

The action below was commenced as a class action. Plaintiff moved for class certification, but the District Court declared the motion moot, when it granted the motion to dismiss the amended class action complaint. The District Court has not yet entertained a motion to certify the Plaintiff Class.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Bertram Field—Plaintiff in the District Court—respectfully prays that the Court deny the petition for issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which reversed the judgment of the United States District Court for the Southern District of New York,[1] with respect to its dismissal of Count I of Respondent's amended class action complaint, for failure to state a claim under the "best-price rule"—Section 14(d)(7) of the Securities Exchange Act of 1934 (the "Williams Act").

[1] The opinion of the District Court is reported at 661 F. Supp. 529 (S.D.N.Y. 1987).

## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit—reported as *Field* v. *Trump*, 850 F.2d 938 (2d Cir. 1988) ("Second Circuit Opinion")—is set forth as Appendix A.

## JURISDICTION

Petitioners' seek to invoke the Supreme Court's jurisdiction, pursuant to 28 U.S.C. § 1254(1)(1982). However, since the order appealed from is interlocutory, based on the allegations of the amended class action complaint, Respondent urges the Court, for the reasons hereafter stated, to decline to accept jurisdiction.

## STATUTORY AND REGULATORY AUTHORITIES

### A. The Williams Act "Best-Price Rule"

1. *Section 14(d)(7):* Plaintiff's principal class action claim arises under Section 14(d)(7) of the Williams Act, (the "best-price rule"), which states that:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.[2]

15 U.S.C. § 78n(d)(7) (footnote added).

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[2] The purpose of this provision is to prevent a tender offeror from discriminating in price among tendering shareholders, and the Securities and Exchange Commission ("SEC"), has stated that:

*(footnote continued on following page)*

2. *Rule 14d-10:* To codify the "all-holders requirement" and "best-price rule," the SEC has adopted Rule 14d-10, 17 C.F.R. § 240.14d-10 (1988), which provides in pertinent part:

> (a) No bidder shall make a tender offer unless:
>
> (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and
>
> (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

3. *Rule 10b-13:* SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 (1988), which prohibits side transactions involving purchases of securities subject to a tender offer, provides, *inter alia:*

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the

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*(footnote continued from preceding page)*

> (i) a tender offer must be extended to all holders of the class of securities which is the subject of the offer (the 'all-holders requirement'); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the 'best-price rule').

Proposed Amendments to Tender Offer Rules, Securities Exchange Act Release No. 6595 [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,797 (July 1, 1985).

> expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

**B. Tender Commencement Rule** [3]

Rule 14d-2(b) provides, *inter alia:*

> A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section [namely, the identity of the bidder and the target, the amount and class of the securities sought, and the price to be paid] with respect to a tender offer . . . shall be deemed to constitute the commencement of a tender offer [for the purposes of Section 14(d) and rules promulgated thereunder] *Except,* That such tender offer shall not be deemed to [have commenced under this section] on the date of such public announcement if within five business days of such public announcement, the bidder . . . [m]akes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer. . . .

17 C.F.R. § 240.14d-2(b) (1988) (emphasis in original).

## STATEMENT OF THE CASE

**A. Introduction**

The Second Circuit Opinion reasserts that Court's recognition, fifteen years ago, that the "best-price rule" cannot be avoided by simply allowing a tender offer to expire and then making a better one. *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 874-75 (2d Cir. 1974), cert.

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[3] Invoked by Petitioner in a spurius attempt to justify the label "withdrawal," no matter how objectively baseless.

*denied,* 419 U.S. 883 (1979). The more recent *Hanson Trust PLC* v. *SCM Corp.*, 774 F.2d 47, 58-59 (2d Cir. 1985), is to the same effect.

In *Cargill,* 498 F.2d at 874, Judge Friendly pointed out that, when the issue on the extent to which the "best-price rule" is decided, it would depend upon the circumstances. He predicted that where the first offer failed, followed by a new one, and the time gap was short—as it is here—a court would likely apply the "best-price rule." *Id.* at 875 n.48.

Those are exactly the circumstances upon which the amended class action complaint is based, and which *Cargill* anticipated 15 years ago. The Court of Appeals did not have to, and did not, look into Petitioners' minds in order to find the circumstances. Petitioners clearly stated what they would do, as the complaint alleges. And they did it. Their words said "withdraw," but their actions bespoke a steadfast determination to continue the tender offer. Their *words* said, and their *actions* confirmed, that they were negotiating a private purchase. Then they *actually* made it. Within only a few hours, and at the same time, they *acted to* and *did* continue the tender. The only change was a $1 price increase.

Under the Williams Act, that kind of conduct does not, as Petitioners assert, require the application of any new general principle, or the expansion of the scope of the "best-price rule." For whether the circumstances alleged in the complaint spell out a private purchase or a continuing tender, is not determined by the Petitioners' labels, "withdrawal" and "new" tender offer. (A-10). As Judge Winter said, speaking for the unanimous Second Circuit panel, if that were the law:

> giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the 'best-

> price rule' . . . The 'best-price rule' . . . is completely unenforceable if offerors may announce periodic, 'withdrawals' during which purchases at a premium are made and thereafter followed by 'new' tender offers. Unless excessive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the 'best price rule' is meaningless.

(A-10). The only thing extraordinary about this case is Petitioners' conduct. And the Williams Act required the Court of Appeals to give Petitioners what they deserve.

At this stage of the proceeding, the circumstances before the Second Circuit, and its decision, furnish no grounds for this Court to take jurisdiction.

**B. Trumps' Single Tender Conduct**

It is important to appreciate the full flavor of what has happened here, assuming, as must be done on a *motion to dismiss,* that Plaintiff's allegations are true. For the circumstances alleged in the complaint add up to an independently identifiable, single, continuous tender offer, which had its inception on August 31, 1984, and was announced on September 7, 1984. It achieved its goal on September 12, 1984, with a two-price tender-merger, $23.50 to the Class, and $25—the best-price—to two insiders, a $1.50 premium (the "Trumps' Single Tender Conduct"). The Merger Agreement, which provided for the tender, remained continuously in effect, despite the purported "withdrawal." We submit that these circumstances lead inescapably to the conclusion of the Second Circuit that, the purported "withdrawal" was not "genuine,"[4] and the Trpmps had not determined to discontinue their tender.

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[4] WEBSTER'S NEW 20TH CENTURY DICTIONARY (Collins World unabr. 2d ed. 1978), defines genuine "2. really being what it is said to be; actually coming from the alleged source of origin; real; true; authentic; not counterfeit or artificial."

The following are the principal allegations, objective, each and every one, which comprise the Trumps' Single Tender Conduct.[5] They are on the public record, and not secreted only in Petitioners' minds:

1. The dissenters, Stroum and Sloan (the "Stroums"), were Pay 'n Save directors and, with their families owned 18.4% of Pay 'n Save Common Stock (A-4).

2. Friction between the Stroums and management, led to management finding a purchaser for Pay 'n Save—the Trump Group (A-4).

3. On August 31, 1984, the Trumps proposed to the directors a $22 cash tender offer, to be followed by a merger (A-5).

4. A week later, the Trumps raised their offer to $22.50; a majority of the directors approved a Merger Agreement to that effect; but the Stroums dissented, calling the offer "skimpy" and arrived at in "unseemly haste" (A-5).

5. On September 7, 1984, the Trumps and Pay 'n Save executed a Merger Agreement, providing for the tender, and the Trumps issued a press release announcing a $22.50 tender-merger price (A-5).

6. Between September 7th and September 12th, one of the Trumps had several conversations with the Stroums trying to settle their objections (A-5).

7. On September 12, 1984: (a) after the close of the market, the Trumps arranged for a 5:10 p.m. (New York time), special telephone conference call with Pay 'n Save directors and (b) a Pay 'n Save lawyer advised the directors that *"in order to facilitate negotiations with Messrs. Stroum and Sloan"*:

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[5] As summarized by the Court of Appeals at A-4-6, unless specific complaint paragraphs are cited.

> "[I]t was necessary . . . to withdraw its tender offer of $22.50 per share, *pending resolution of the negotiations with Messrs. Stroum and Sloan.* HE MADE IT CLEAR TO THE DIRECTORS THAT THE MERGER AGREEMENT WAS STILL IN EFFECT."

(Complaint ¶ Forty-Second) (emphasis added).

8. On the evening of September 12, 1984, after the telephone directors meeting, the Trumps issued a press release announcing both the purported "withdrawal," and that its purpose was to negotiate with the Stroums (A-5).

9. Later that same night of September 12th, the Trumps and Stroums entered into a Settlement Agreement providing for: (a) increasing the tender offer to $23.50; and (b) paying the Stroums $4.2 million for an option to purchase their shares and for legal fees and expenses, which, when added to the $23.50 tender price, amounted to a $1.50 per share premium, for a total of $25 per share for the Stroums (A-5).

10. The next day, September 13th, a Pay 'n Save press release announced the new $23.50 tender price (A-6).

11. The press release announcing the purported "withdrawal" and the "new" price, reached the public simultaneously (A-6).

## SUMMARY

As the Trumps' Single Tender Conduct demonstrates, the circumstances here are so studded with objective allegations, real and actual, that Petitioners' psychological, "subjective intent" accusations, are as contrived as they are illusory. For this case involves the circumstances and the kind of minute time gap anticipated by Judge Friendly in *Cargill,* 498 F.2d 851:

*First:* Rule 14d-2(b) provides that a tender offer shall not be deemed to have commenced where the bidder "has determined not to continue with such tender offer." Here, the complaint alleges that the Trumps never determined not to continue. On the contrary, they kept the Merger Agreement and public tender, alive and well. And, their first September 12th press release, made it clear that they were facilitating the negotiations for the private purchase of the Stroum shares, and not discontinuing the tender-merger. The Trumps never wavered in their goal: continuing the tender, until they achieved control of Pay 'n Save.[6]

*Second*: The press releases issued in the evening and night of September 12th, and the contemporaneous option and fee settlement, were timed so that the purported "withdrawal" would have no viable public impact. When word finally reached the public the next morning, the news of the $23.50 price had eclipsed the stale purported "withdrawal." Most of the country never heard about it until that morning.

Rule 14d-2(b), on which Petitioners rest their entire case, would have permitted the Trumps, after their September 7th $22.50 press release, to make a subsequent public announcement stating that they had "determined not to continue with such tender offer. . . ." Petitioners' problem is that the Trumps made *two subsequent public announcements simultaneously*—the $22.50 purported "withdrawal" together with the $23.50 "new" tender. Such twin announcements do not comply with Rule 14d-2(b). And under the "best-price rule," the Trumps' price increase, is a "continuation of the original offer, rather than as a new tender offer." (A-10).

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[6] And they did it in a flash—5 days from the public announcement; 12 days after their first proposal.

Under Rule 14d-2(b), the Trumps' determination to continue the tender never paused. And under the "best-price rule," Trumps' increased price was a continuation of the original, and not a "new" tender.

Petitioners protest that the Trumps' labels should be credited, but their actions ignored. Under that self-serving scenario, all the Trumps had to do was *say* they were withdrawing their tender, even though they then *acted to* immediately reinstate it. The Trumps' artifice, contrives the illusion that by a single utterance of the word "withdrawal" —and nothing else—they complied with the Williams Act. But that veil is so flimsy, it cannot conceal the fact that the Merger Agreement was still in effect, the "new" offer followed almost immediately, and it reached the public in tandem with the purported "withdrawal." We submit that such a construct spells out "mirage," not Williams Act.

It is sophistry for Petitioners to claim that the Second Circuit's finding that the original tender offer-merger *had not been withdrawn,* depended upon Trump's "subjective intent." (Cert. Pet. 12). On the contrary, all of the actions, discussions, and meetings between the parties, demonstrated that the Trumps considered the original tender offer-merger *as the basis for all of their negotiations.* Price was the only item on the table.

The whole point of the few hours of continuing negotiations, and the only reason for the "withdrawal" label, was to save the Trumps $18 million. They paid the Class only $23.50 per share, and gave the best-price to the dissident Stroums alone, a $1.50 premium—$25 per share. The only thing new was the $1 price increase. Therefore, as the Second Circuit said, under the "best-price rule," such a price increase "is a continuation of the original offer, rather than a new tender offer." (A-10).

The final indignity to the public shareholders, for whose protection the "best-price rule" is designed, is this: The after market closing notice of the purported "withdrawal," was overtaken the following morning by the increased price news. The public never heard of the purported "withdrawal," before the price increase.

There is absolutely nothing subjective about that.

## REASONS FOR DENYING THE WRIT

### I.

### THE WRIT SHOULD BE DENIED BECAUSE THE PETITION IS PREMATURE; THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ITS FIFTEEN YEAR OLD VIEW OF THE "BEST-PRICE RULE"; AND THERE IS NO EXTRAORDINARY BASIS FOR REVIEW BEFORE THE FINAL DECREE

The Supreme Court custom not to issue a writ of certiorari to review a Court of Appeals decree on appeal from an interlocutory order by invoking the Court's jurisdiction, pursuant to 28 U.S.C. § 1254(1) (1982), is of long standing. Nevertheless, Petitioners seek such extraordinary relief. In *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893), this Court long ago established that:

> Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this Court should not issue a writ of

> certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

*Id.* at 384.

The opinion below is not final. That is a fact which "of itself alone" may furnish "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Supreme Court traditionally exercises its discretion to grant a petition for a writ of certiorari sparingly. *Id.* ("except in extraordinary cases the petition is not issued until final decree"); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (Supreme Court denied union's petition for writ of certiorari "because the Court of Appeals remanded the case, [and therefore] it is not yet ripe for review by this Court"). Yet Petitioners never mention, much less address, the interlocutory nature of the Second Circuit's opinion.

Accepting the allegations of the complaint as true, the Court of Appeals noted that "[i]f the allegations are proven, a $1.50 premium to the Stroums would violate Section 14(d)(7)." (A-12). Thus, plaintiff still must prove his allegations at trial. On that basis alone, the Supreme Court's denial of the petition, at this stage of the proceedings, would not prejudice Petitioners' right, on final judgment, to raise the same issues. *See Urie* v. *Thompson*, 337 U.S. 163, 172-73 (1949); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 672 n.19 (1979), *modified*, 444 U.S. 816 (1979). And denying the petition, will not "establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*,

409 U.S. 363, 365 n.1 (1973), *reh'g denied*, 410 U.S. 975 (1973) (citing *Indianapolis* v. *Chase Nat'l Bank*, 314 U.S. 63 (1941)).

We submit that Petitioners offer no compelling reason sufficient to persuade this Court to depart from its normal practice of denying interlocutory review. The only extraordinary aspects of this case are Petitioners' attempts to circumvent and eviscerate the "best-price rule"; their belated discovery of "subjective intent"; and their making this petition, in disregard, or ignorance of *Cargill*.

As previously noted, the Court of Appeals opinion follows the path predicted by *Cargill*. After all these years, there is nothing new or extraordinary about the law applicable to this case,[7] no uncertainty, and no conflict with any other decision anywhere. No court has ever held that an offeror can fabricate a "withdrawal." If it isn't real and true—100% and not 50%—then, under Rule 14d-2(b), the tender continues and the purported "withdrawal" has no effect. Therefore, the "best-price rule" applies, as Congress intended.

[7] The cases cited by Petitioners are inapposite, for none were confronted with the unusual collection of circumstances which make up the fabric of the amended class action complaint. The only authority which does anticipate them, was never cited by Petitioners: *Cargill*, 498 F.2d 851.

## II.

## THE COURT OF APPEALS' UNANIMOUS "BEST-PRICE" DECISION, IS CONSISTENT WITH THE FACTS ALLEGED, AND WITH THE LAW, AND DOES NOT REQUIRE EXTRAORDINARY REVIEW

### A. Labels Do Not A Withdrawal Make

The heart of the decision below, which Petitioners find so repugnant and unusual, is that "[w]hether the purchase of the Stroums' shares was a private purchase or part of a continuing tender offer is not determined simply by the Trumps' use of the labels 'withdrawal' and 'new' offer. (A-10) (citing *McDermott, Inc.* v. *Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980) (announcement of increase in number of shares sought not new tender.)

This is how Judge Winter, for the unanimous Second Circuit panel, explained the Court's reasoning:

> Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the acquiror. *Wellman* v. *Dickinson*, 475 F. Supp. 783, 823-25 (S.D.N.Y. 1979) (so-called 'privately negotiated' purchases of shares constitute tender offer for purposes of Williams Act); *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). Were the label used by the acquiror determinative, virtually all of the provisions of the Williams Act, including the filing and disclosure requirements could be evaded simply by an offeror's announcement that offers to purchase of stock were private purchases. *Id.*

(A-10-11).

On the allegations before it—the Trumps' Single Tender Conduct—the Second Circuit's conclusion was inescapable:

> Similarly, giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the 'best-price rule.' For example, plaintiff has alleged that the purported withdrawal of the original tender offer was intended solely to allow the Trumps to pay a premium of $1.50 per share of the Stroums that was not offered to shareholders who tendered pursuant to the 'new' tender offer announced immediately thereafter. The 'best-price rule' of Section 14(d)(7) and Rule 14d-10 is completely unenforceable if offerors may announce periodic 'withdrawals' during which purchases at a premium are made and thereafter followed by 'new' tender offers. *Unless successive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the 'best-price rule' is meaningless.*

(A-10) (footnote omittted; emphasis added).

Judge Friendly reached the same conclusion in *Cargill*, 498 F.2d 851. There, Missouri Portland, the target of a tender offer by Cargill, wrote its shareholdders that if Cargill increased the tender price during the tender offer, shareholders who had already tendered, would not get the higher price. The District Court had found the letter misleading because, under Section 14(d)(7), the stockholders were entitled to such a higher "best price." But Missouri Portland responded by explaining that its letter referred to a higher price in a "new" offer.

On appeal, Judge Friendly said that "how far the strictures of § 14(d)(7) can be avoided by allowing an offer to expire and then making a better one is an issue as yet undecided." *Id.* 498 F.2d at 875. But in footnote 48, Judge Friendly pointed out that: "Probably much will depend

upon the circumstances. If the first offer was a failure and the time gap short, a court would be likely to hold that the statute applies; *per contra* if the time gap was substantial and there had been a general increase in stock prices." *Id.* at 875 n.48.

Moreover, the Second Circuit Opinion pointed out that in 1985, that Court had "explicitly recognized that purchases after a purported withdrawal of a tender offer may constitute a continuation of the offer in light of the surrounding circumstances." (A-10). (citing *Hanson Trust PLC* v. *SCM Corp.*, 774 F.2d 47 (2d Cir. 1985)).

Significantly, Judge Winter added that the "best-price rule" itself permits a price increase as part of the original offer: *"Finally, Section 14(d)(7) itself explicitly treats a material change in the terms of a tender offer in the form of an increased price as a continuation of the original offer rather than as a new tender offer. Clearly, therefore, purchases of shares by an offeror after a purported withdrawal of a tender offer may constitute a continuation of the original tender offer."* (A-10) (emphasis added).

Here, of course, the Merger Agreement stood solid. The only change was price. And that's exactly what, as a matter of law, makes the tender-merger one, solitary, single, continuous tender-merger. Under the "best-price rule," there was nothing new about it.

### B. Under The "Best-Price Rule," The Withdrawal Must Be Genuine

Petitioners' mere calling the Trumps' continuing tender withdrawn, does not make it so. All of the allegations are to the contrary. The circumstances required little interpretation, because they were not hidden. They were there for all to see, and the Court of Appeals observed them clearly and correctly:

> For purposes of the 'best-price rule,' therefore, an announcement of a withdrawal is effective when the offeror *genuinely* intends to abandon the goal of the original offer. [*See Hanson Trust*, 774 F.2d at 58-59] (termination of tender offer effective in light of evidence that goal of obtaining control of target corporation was abandoned). The complaint here alleges that the Trumps' Offer to Purchase explicitly stated that the purported withdrawal was intended to allow negotiations with the Stroums. Such negotiations indicate a continuing intent to obtain control of Pay'n Save.
>
> Moreover, the complaint alleges conduct from which inferences might be drawn that the Trumps had not abandoned the goal of the original offer.

(A-11) (emphasis added).

**C. Under Rule 14d-2(b), The Determination Not To Continue Must Be Genuine**

Petitioners protest that Rule 14d-2(b) gives them the absolute, unqualified, unconditional right to claim that the tender-merger was discontinued, regardless of the Trumps' conduct. The Second Circuit correctly rejected such an inflexible disregard for what the securities laws are all about —the truth:

> That Rule merely creates a window of time during which a genuine withdrawal leaves matters for all legal purposes as though a tender offer had never been commenced. The Rule does nothing to alter the principle that the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw. The Rule is also irrelevant because a bidder is always free to withdraw a tender offer. The argument advanced by defendants,

> if correct, would thus apply even in cases in which the provisions of Rule 14d-2(b) governing withdrawal announcements did not.

(A-11) (footnote omitted).

Petitioners' claim that under Rule 14d-2(b), by the Trumps' use of the label "withdrawal," their tender offer must be deemed never to have commenced. Do they seriously contend that the Congress gave the Trumps a blank check to use the word "withdrawal" to deny the existence of their tender, even if it wasn't true?

The Trumps' Single Tender Conduct, leaves no room, nor basis, for Petitioners' desperate attempt to convert the Second Circuit's opinion into an exercise of "subjective intent." Yet that charge is what the petition is all about. It is false, because it was what the Trumps are alleged to have actually said, and actually did, which was critical to the Court's determination that the Trumps had not abandoned the tender offer.

Furthermore, the Second Circuit properly pointed out that in order to ascertain whether an offeror had abandoned the goal of the original tender offer, courts may employ an objective test similar, if not identical, to that used to determine whether single or multiple offerings have been made for purpose of securities registration requirements. Such scrutiny could include the following factors: (1) whether the offers were made as part of a single plan of acquisition; (2) were the same class of security involved in the purchase; and (3) were the offers made at or about the same time. (A-12). Here the answer to each is, of course, affirmative.

The Trumps' Single Tender Conduct evidences that the Second Circuit did not apply a "subjective intent" test. It did not have to. For the Trumps' actions were uninterruptedly consistent with the continuation of the tender offer.

## CONCLUSION

The petition is as premature, as it is bereft of any grounds for the extraordinary relief it seeks. For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 419 August Term, 1987

(Argued January 6, 1988) Decided

Docket No. 87-7578

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BERTRAM FIELD,
*Plaintiff-Appellant,*

v.

JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY'N SAVE CORPORATION, THE TRUMP GROUP, LTD., NLAC CORP., ACQUICORP, INC., MERGICORP, INC., TGAC CORP. and TG LIMITED,
*Defendants-Appellees.*

---

B e f o r e: VAN GRAAFEILAND, WINTER and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) dismissing, under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), plaintiff's amended class-action complaint. The district court dismissed plaintiff's claim brought under Section 14(d)(7) of the Securities Exchange Act of 1934 holidng that a purported withdrawal of a tender offer was effective even though the withdrawal was followed within

a few hours by acquisition of an option to purchase a large block of the stock subject to the tender offer, and therafter by an announcement of a purportedly new tender offer. The district court also held that plaintiff had failed to state claims under RICO or under Sections 10(b), 14(a) and 14(e) of the '34 Act, and Rules 10b-5, 10b-13 and 14a-9 thereunder. We reverse the dismissal of plaintiff's claim under Section 14(d)(7) but affirm the dismissal of the remanining federal claims.

IRA A. FINKELSTEIN, New York, New York (William Klein II, Owen D. Kurtin, Tenzer, Greenblatt, Fallon & Kaplan, New York, New York, of counsel), *for Plaintiff-Appellant.*

JOEL M. WOLOSKY, New York, New York (Alvin M. Stein, Charles W. Stotter, Parker Chapin Flattau & Klimpl, New York, New York, of counsel), *for Defendants-Appellees Julius Trump, Eddie Trump, M. Lamont Bean, E. Ronald Erickson, Calvin Hendricks, The Trump Group, Ltd.,, NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp, and TG Limited.*

THOMAS J. SCHWARZ, New York, New York (Thomas R. deRosa, David G. Cohen, Skadden, Arps, Slate, Meagher & Flom, New York, New York, of counsel), *for Defendants-Appellees Stuart M. Sloan and Samuel N. Stroum.*

Michael H. Rauch, Terrence A. Corrigan, Fried, Frank, Harris, Shriver, & Jacobson, New York, New York, *for Defendants-Appellees Fenwick Crane, Robert B. Hutchinson, Earl W. Smith, Raymond C. Swanson and Pay'n Save Corporation.*

WINTER, *Circuit Judge*:

The legal issues in this appeal concern the meaning of the so-called "best-price rule" of Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7) (1982), and the disclosure obligations of a publicly held company under that Act.

Accepting the allegations of the complaint as true, this dispute arises from a leveraged buy-out in which defendants Julius and Eddie Trump, through corporations they owned and controlled, commenced a tender offer at a price of $22.50 per share for shares of defendant Pay'n Save Corporation, a Washington state corporation. Shortly after the market closed on the fourth business day after the announcement of the tender offer, the Trumps "withdrew" the offer in order to arrange a purchase of a bloc of shares from certain dissident directors. Later that night, after acquiring an option to purchase the dissidents' shares, the Trumps announced a "new" tender offer at $23.50 per share. When the price of the option and a side payment for "fees and expenses" is taken into account, the dissidents received $25.00 per share, a $1.50 premium over the price paid to the tendering shareholders.

Bertram Field subsequently brought this class action in the Southern District against the Trumps, their firms, Pay'n Save and its officers and directors. The amended complaint alleged that the agreement between the Trumps and the dissident directors violated Section 14(d)(7), commonly known as the "best-price" provision of the Williams Act, and SEC Rule 10b-13. 17 C.F.R. § 240.10b-13 (1987). In addition, the complaint alleged that various documents relating to the tender offer, and an earlier Pay'n Save proxy statement, contained material omissions, in violation of Sections 10(b), 14(a) and 14(e) of the '34 Act, 15 U.S.C. §§ 78j(b), 78n(a), (e) (1982), Rules 10b-5 and 14a-9 thereunder, 17 C.F.R. §§ 240.10b-5, 14a-9 (1987), and, of course, by extension, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d) (1982). Field alleged pendent state-law claims as well.

Judge Goettel dismissed the amended complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Field v. Trump*, 661 F. Supp. 529 (S.D.N.Y. 1987). The district court held that plaintiff did not state a claim under Section 14(d)(7) because the Trumps had announced an effective withdrawal of their tender offer before they struck their deal with the dissident directors, *id.* at 532, and that plaintiff was not a proper party to invoke Rule 10b-13. *Id.* at 533. The district court also dismissed the nondisclosure counts on the ground that they were attempts to bootstrap state-law fiduciary-duty claims into a federal securities-law action. Finally, Judge Goettel found that the complaint failed to allege a "pattern of racketeering activity" under RICO. We reverse the dismissal of the Section 14(d)(7) claim and the pendent state claims but otherwise affirm.

## BACKGROUND

According to the amended complaint, the allegations of which we must accept as true, this dispute originates in Pay'n Save's acquisition of Schuck's Auto Supply, Inc. in January 1984. That transaction left the former owners of Schuck's, defendants Samuel N. Stroum and Stuart M. Sloan and members of their families ("Stroums" or "Stroum Group"), holding 18.4% of Pay'n Save's outstanding common stock. The Stroums were not happy shareholders, however, and had their own ideas about how to run Pay'n Save. Looking for ways to pacify the Stroums, Pay'n Save management sought and obtained a standstill agreement dated March 30, 1984. The Stroums agreed not to sell or otherwise dispose of their shares, or to offer to purchase Pay'n Save. In return, Stroum and Sloan received seats on the company's board.

Friction between the Stroums and management nevertheless continued. As a result, management retained Kidder Peabody and later Merrill Lynch Capital Markets to find a purchaser for the company. To the same end, defendant Calvin Hendricks, Pay'n Save's Chief Financial Officer and Vice-Chairman of its board, undertook discussions with Eddie Trump, President of the Trump Group, Ltd., about acquiring Pay'n Save. According to its subsequent Offer to Purchase, the Trump Group took the

position that it "would only consider an acquisition of the company if management would participate in the equity of the resulting entity." Offer to Purchase at 4. Management agreed, and on August 31 the Trumps proposed to the Pay'n Save board a cash tender offer at $22.00 per share for two-thirds of the company's outstanding shares, to be followed by a cash-out merger at the same price. One week later, in the early morning hours of a late-night Pay'n Save board meeting, the Trumps raised their offer to $22.50 but warned that it would be withdrawn if it were not approved. Merrill Lynch opined that $22.50 was a fair price, and a majority of Pay'n Save's board approved it. Stroum and Sloan dissented. That morning, September 7, 1984, Pay'n Save issued a press release announcing that it had reached a merger agreement with the Trumps and that the Trumps were initiating a tender offer at $22.50. In a statement of their own, the Stroums called the Trump offer "skimpy" and accused management of acting in "unseemly haste."

During the next few days, according to the Offer to Purchase, "Eddie Trump contacted Messrs. Stroum and Sloan and the parties had several conversations concerning the possibility of settling the objections of Messrs. Stroum and Sloan to the Transactions." Offer to Pruchase at 6. At 5:10 p.m. on September 12, after a meeting between the Trumps, Stroum and Sloan, the Trumps told Pay'n Save's board that they were withdrawing their previously announced tender offer in order "too facilitate the negotiations with Messrs. Stroum and Sloan." *Id.* The Trumps also issued a press release announcing both the withdrawal of their tender offer and their negotiations with the Stroums. These negotiations quickly bore fruit. Late that night, the Trumps and the Stroums entered into a Settlement Agreement under which the Trumps paid the Stroums $3,300,000 for an option to purchase the Stroums' shares at $23.50 per share. In addition, the Trumps paid the Stroums $900,000 for the Stroums' "fees and expenses." The Settlement Agreement was subject to the Pay'n Save board's approval of an amendment to the September 7 merger agreement that would provide for an increased price of $23.50 per share for the tender offer and merger. The $4,200,000 payment (option price plus "fees and expenses"), when added

to the $23.50 per share purchase price, amounted to a price of $25.00 per share for the Stroums.

The next day, September 13, the Pay'n Save board approved the amendment to the merger agreement, and Pay'n Save issued a press release announcing that the Trumps would soon proceed with a tender offer at the new $23.50 price. According to the complaint, the press release announcing the new price and the September 12 press release announcing the "withdrawal" reached the public simultaneously.

Claiming to have been a Pay'n Save shareholder who tendered shares of $23.50, a $1.50 less than the price paid to the Stroums, plaintiff brought this putative class action against Pay'n Save, its officers (M. Lamont Bean, Chairman of the Board and Chief Executive Officer; E. Ronald Erickson, President and Chief Operating Officer; and Calvin Hendricks, Vice Chairman of the Board and Chief Financial Officer), its pro-management directors (Fenwick Crane, Raymond C. Swanson, Robert B. Hutchinson and Earl W. Smith), the dissident directors (Stroum and Sloan), and the Trumps and their affiliated entities (Eddie Trump, Julius Trump, the Trump Group, Ltd., NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp. and TG Limited).

Count I of the complaint alleged that the $4,200,000 received by the Stroums constituted a premium of $1.50 per share above the price received by other shareholders, in violation of Section 14(d)(7) and Rule 10b-13. Count II alleged that the Trumps' Offer to Purchase and an earlier Pay'n Save proxy statement contained various omissions of material facts, in violation of Sections 10(b) and 14(e) of the '34 Act and Wash. Rev. Code § 21.20.010 (1978). Count III alleged that Pay'n Save's officers and directors had conducted, and had conspired to conduct, the affairs of Pay'n Save through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. § 1962(c) and (d). Finally, Count IV alleged that, under the common law of the State of Washington, Pay'n Save's officers and directors had committed various breaches of their fiduciary duties of loyalty and care in connection with the sale of Pay'n Save.

## DISCUSSION

1. *The Section 14(d)(7) Claim*

Plaintiff's principal claim arises under Section 14(d)(7) of the Williams Act, the so-called "best-price" provision, which states that:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7). The purpose of this provision is to prevent a tender offeror from discriminating in price among tendering shareholders. The position taken by the SEC thus is that:

> (i) a tender offer must be extended to all holders of the class of securities which is the subject of the offer (the "all-holders requirement"); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the "best-price rule").

Proposed Amendments to Tender Offer Rules, Securities Act Release No. 6595 [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶83,797 (July 1, 1985). To codify the "all-holders requirement" and "best-price rule," the SEC has adopted Rule 14d-10, 17 C.F.R. § 240.14d-10 (1987), which provides in pertinent part:

> (a) No bidder shall make a tender offer unless:
>
> (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and
>
> (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

To the same end, the SEC has promulgated a rule prohibiting side transactions involving purchases of securities subject to a tender offer. Rule 10b-13 thus provides in pertinent part:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

The essence of plaintiff's claim is that the $4,200,000 paid to the Stroums during the brief "withdrawal" of the offer was in law and fact a payment of a $1.50 per share premium intended to induce the Stroums to accept the tender offer. The failure to pay this premium to the other tendering shareholders, plaintiff argues, violated the "best-price rule."

No party disputes the proposition that payment of a premium to one shareholder and not others during a tender offer is illegal. The issue rather is whether the purported withdrawal effectively ended the offer so that the $4,200,000 payment was not during or part of a tender offer. In dismissing the Section 14(d)(7) claim, the district court relied upon SEC rules governing the commencement of a tender offer, specifically Rule 14d-2(b), which provides that:

> [a] public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section [namely, the identity of the bidder and the target, the amount and class of the securities sought, and the price to be paid] with respect to a

> tender offer . . . shall be deemed to constitute the commencement of a tender offer [for the purposes of Section 14(d) and rules promulgated thereunder] *Except*, That such tender offer shall not be deemed to [have commenced under this section] on the date of such public announcement *if within five business days of such public announcement, the bidder . . . [m]akes a subsequent public anouncement stating that the bidder has determined not to continue with such tender offer*. . . .

17 C.F.R. § 240.14d-2(b) (1987) (emphasis added). Thus, while the public announcement of the essential terms of a tender offer results in the technical "commencement" of a tender offer, the offer will nevertheless be legally deemed not to have commenced if its withdrawal is announced within five business days. In the instant case, the initial announcement of the Trumps' tender offer came on the morning of Friday, September 7, 1984, and the purported withdrawal was announced on the afternoon of Wednesday, September 12, four business days later. Based on these facts, the district court concluded that, for purposes of Section 14(d)(7), "there was no tender offer in place at the time of the Settlement Agreement, and thus, as a matter of law, no violation of [that] Section." 661 F. Supp. at 532. We disagree, however, and believe that the allegations of the complaint state a claim under the Williams Act.

The Williams Act does not define "tender offer." Courts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act. *SEC v. Carter Hawley Hale Stores*, 760 F.2d 945, 950 (9th Cir. 1985); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985) (eight factor "test"; balancing of factors in particular case determined in light of Act's policy to protect ill-informed solicitees). Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the acquiror. *Wellman v. Dickinson*, 475 F.

Supp. 783, 823-25 (S.D.N.Y. 1979) (so-called "privately negotiated" purchases of shares constitute tender offer for purposes of Williams Act); *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983). Were the label used by the acquiror determinative, virtually all of the provisions of the Williams Act, including the filing and disclosure requirements could be evaded simply by an offeror's announcement that offers to purchase of stock were private purchases. *Id.*

Similarly, giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the "best-price rule." For example, plaintiff has alleged that the purported withdrawal of the original tender offer was intended solely to allow the Trumps to pay a premium of $1.50 per share of the Stroums that was not offered to shareholders who tendered pursuant to the "new" tender offer announced immediately thereafter.[1] The "best-price rule" of Section 14(d)(7) and Rule 14d-10 is completely unenforceable if offerors may announce periodic "withdrawals" during which purchases at a premium are made and thereafter followed by "new" tender offers. Unless successive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the "best-price rule" is meaningless.

Whether the purchase of the Stroum shares was a private purchase or part of a continuing tender offer is not determined simply by the Trumps' use of the labels "withdrawal" and "new" offer. *Cf. McDermott, Inc. v. Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980) (announcement of increase in number of shares sought not new tender offer). Indeed, we have explicitly recognized that purchases after a purported withdrawal of a tender offer may constitute a continuation of the offer in light of the surrounding circumstances. *Hanson Trust*, 774 F.2d at 58-59. Finally, Section 14(d)(7) itself explicitly treats a material change in the terms of a tender offer in the form of an increased price as a continuation of the original offer rather than as a new tender offer. Clearly, therefore, purchases of shares by an offeror after a purported withdrawal of a tender offer may constitute a continuation of the original tender offer.

Rule 14d-2(b) is not to the contrary. That Rule merely creates a window of time during which a genuine withdrawal leaves matters for all legal purposes as though a tender offer had never been commenced. The Rule does nothing to alter the principle that the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw. The Rule is also irrelevant because a bidder is always free to withdraw a tender offer. The argument advanced by defendants, if correct, would thus apply even in cases in which the provisions of Rule 14d-2(b) governing withdrawal announcements did not.[2]

For purposes of the "best-price rule," therefore, an announcement of a withdrawal is effective when the offeror genuinely intends to abandon the goal of the original offer. *See id.* (termination of tender offer effective in light of evidence that goal of obtaining control of target corporation was abandoned). The complaint here alleges that the Trumps' Offer to Purchase explicitly stated that the purported withdrawal was intended to allow negotiations with the Stroums. Such negotiations indicate a continuing intent to obtain control of Pay'n Save.

Moreover, the complaint alleges conduct from which inferences might be drawn that the Trumps had not abandoned the goal of the original offer. In determining the most appropriate analysis for evaluating the conduct of an offeror surrounding a purported withdrawal, we draw upon a suggestion of Professor Loss. He has noted that the determination of whether formally separate offerings of securities should be "integrated," and thus considered a single offering, for the purposes of the various registration exemptions, is closely analogous to the question of whether single or multiple tender offers have been made. L. Loss, *Fundamentals of Securities Regulations* 577 n.33 (1983) (suggesting comparison of " 'integration' problem with respect to certain exemptions under the 1933 Act" with Section 202(166)(B) of the ALI's proposed Federal Securities Code, which "treats [tender] offers as separate if they are for different classes of securities or are 'substantially distinct on the basis of such factors as manner, time, purpose, price and kind of consideration' ").

In establishing criteria to govern the integration of formally separate offerings, the SEC has identified the following factors, *inter alia*, as relevant: "(1) are the offerings part of a single of financing; (2) do the offerings involve issuance of the same class of security; (3) are the offerings made at or about the same time . . . ?" Section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434 (Dec. 6, 1961). Analogous factors may thus point to "integration" in the context of formally separate tender offers: (1) are the offers part of a single plan of acquisition; (2) do the offers involve the purchase of the same class of security; and (3) are the offers made at or about the same time? These factors are useful in determining the ultimate fact of whether an offeror has abandoned the goal of an initial tender offer in announcing a withdrawal of that offer. As previously noted, where the goal has not been abandoned, a purported withdrawal followed by a "new" offer must be treated as a single continuing offer for purposes of the "best-price rule."

Accepting as true the facts alleged in plaintiff's complaint, all of the listed factors weigh in favor or treating the Trumps' acquisition of Pay'n Save shares as a single tender offer. If the allegations are proven, the alleged $1.50 premium to the Stroums would violate Section 14(d)(7).

The parties and the district court have correctly assumed that Section 14(d)(7) impliedly affords a private right of action to shareholders. In *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.), *cert. denied*, 107 S. Ct. 445 (1986), we held that the best-price provision's statutory neighbor, Section 14(d)(6) of the '34 Act, 15 U.S.C. § 78n(d)(6) (1982), which requires pro rata acceptance of tendered shares in oversubscribed offers, could be privately enforced. Section 14(d)(7) certainly provides at least as strong a basis for the implication of a private remedy as does Section 14(d)(6). As in *Pryor*, the plaintiff here is "surely [one of] the primary intended beneficiaries of [the statute], since 'the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.' " 794 F.2d at 57 (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977)). Moreover, Section 14(d)(7), like Section 14(d)(6) and "unlike the bulk of

federal securities regulation, confers a substantive right on [its] beneficiaries," thereby "suggest[ing] that Congress intended to create a private right of action." *Id.* In addition, as is true of the proration provision, a private damage action provides a particularly effective means of enforcing the strictures of the "best-price rule." When a premium is paid to one shareholder in violation of Section 14(d)(7), "the injury is easy to calculate, the victims are easy to locate, and the likelihood of litigation by such victims is high if a private right of action exists." *Id.* at 58. Finally, a cause of action under Section 14(d)(7) is not one "traditionally relegated to state law." *Id.* (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Accordingly, we hold that Section 14(d)(7) affords private plaintiffs an implied right of action, and we therefore reverse the dismissal of the Section 14(d)(7) claim.[3]

2. *The Nondisclosure Claims*

Count II of the amended complaint alleged that the various documents relating to the Pay'n Save tender offer and merger, and an earlier Pay'n Save proxy statement, contained various omissions of material facts in violation of Sections 10(b), 14(a) and (e) of the '34 Act, and Rules 10b-5 and 14a-9. As the district court noted, most of these claims essentially allege that Pay'n Save's officers and directors breached their fiduciary duties of loyalty and care under Washington law and failed to disclose these breaches. For example, plaintiff alleged that the defendants had failed to disclose the following "material facts":

> — "Value for the shareholders might have been . . . maximized if the Stroums . . . had been approached, as a potential acquirer."
>
> — "The Standstill Agreement . . . significantly restricted [Pay'n Save's] potential for maximi[z]ing value for its shareholders."
>
> — "The Stroums . . . might have been interest[ed] in acquiring all of the Company . . . but were prevented from doing so because Management and [the] Directors had . . . refused to approach them."
>
> — "Neither Management nor [the] Directors made any effort at all to obtain for the [plaintiff] Class, the

> Premium paid to the Stroums, . . . to obtain an independent and written legal opinion . . . as to [the] validity [of the withdrawal], . . . to adequately inform themselves of the advisability of entering into the Merger Agreement . . ., to adequately inform themselves as to, or to determine what would constitute, a fair premium to the public shareholders . . ., [and] to obtain $25 per share for the public shareholders . . . ."

Amended Complaint ¶¶54-55, 59 (emphasis omitted).

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), the Supreme Court refused to construe Section 10(b) to prohibit "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." The Court held that Section 10(b), as its plain language suggests, prohibits only conduct "involving manipulation or deception," *id.* at 473, manipulation being "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artifically affecting market activity," *id.* at 476, and deception being "misrepresentation, or nondisclosure" intended to deceive. *Id.* Similarly, in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7-8 (1985), the Court rejected the contention that "manipulative" conduct under Section 14(e) differed in scope from conduct deemed manipulative in *Santa Fe* under Section 10(b). The Court observed that "the three species of misconduct" targeted under both sections, namely " 'fraudulent, deceptive, or manipulative' " acts, "are directed at failures to disclose." *Id.* at 8 (citing 15 U.S.C. § 78(n)(e)). The Court accordingly held that "the term 'manipulative' as used in [Section] 14(e) requires misrepresentation or nondisclosure," and "connotes 'conduct designed to deceive or defraud investors by controlling or artifically affecting the price of securities.' " *Id.* at 12 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

The Court in *Schreiber* did not, as it had in *Santa Fe* with respect to Section 10(b), express concern that the extension of Section 14(e) to conduct not involving misrepresentation or

nondisclosure might "interfere with" or "federalize" state corporate law. *Santa Fe*, 430 U.S. at 479. Yet, as *Schreiber's* reliance on *Santa Fe* suggests, the policy against overriding state corporate law absent a clear indication of contrary congressional intent applies with equal force to Section 14(e). In anticipating *Schreiber* in *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), we refused to "embark . . . on a course leading to a federal common law of fiduciary obligations." *Id.* at 4; *see also Lewis v. McGraw*, 619 F.2d 192 195 (2d Cir.) (per curiam), *see also Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.) (per curiam), *cert. denied*, 449 U.S. 951 (1980). Similarly, we have implicitly expressed our disapproval of the use of Section 14(a) and Rule 14a-9 "as an avenue for access to the federal courts in order to redress alleged mismanagement or breach of fidicuary duty." *Maldonado v. Flynn*, 597 F.2d 789, 796 (2d Cir. 1979). We noted further in *Maldonado* that

> [e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes have consistently been rejected, including allegations of failure to disclose a disputed legal theory regarding the legality of transactions approved by the board, failure to disclose an alleged ulterior motive for a fully described corporation action, or failure to disclose lack of skill or judgment in approving a transaction intended for the corporation's benefit.

*Id.* (citations omitted). Other courts have taken similar positions with respect to Section 10(b) and Rule 10b-5. *See, e.g., Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) ("plaintiff may not 'bootstrap' a claim of breach of fiduciary duty into a federal securities law claim by alleging that directors failed to disclose that breach of fiduciary duty"; "if the validity of a shareholder's claim of material misstatement or nondisclosure rests solely on a legal determination that the transaction was unfair to a minority shareholder or that an officer or director's conduct amounted to a breach of his fiduciary duty, the claim does not state a cuase of action under sections 10(b) or 14(a)"); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 287-89 (7th Cir.) (same under Section 10(b)), *cert. denied*, 454

U.S. 1092 (1981); *Biesenbach v Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (same, Section 10(b)).

Language in Judge Friendly's opinion *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978), case not cited by the plaintiff, qualifies the broad proposition that there is no cause of action under Section 10(b) for non-disclosure of facts material only to support an action for breach of a fiduciary duty under state law. While conceding that some of the Court's statements in Part IV of *Santa Fe* squarely supported that proposition, Judge Friendly nevertheless stated:

> Thus the Court, quoting from *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40, 97 S. Ct. 926, 51 L.Ed.2d 124 (1977), said that one factor in determining whether a case was covered by § 10(b) and Rule 10b-5, was " 'whether the cause of action [is] one traditionally relegated to state law . . . .' " But the Court quickly added, after referring to the Delaware appraisal statute, that "Of course, the existence of a particular state law remedy is not dispositive of the question whether Congress meant to provide a similar federal remedy," and it would be hard to think of a cause of action more "traditionally relegated to state law" than the one asserted in the *Superintendent of Insurance* case, which, as has been said, made "just plain stealing" a fraud under Rule 10b-5, on the basis that Begole failed to tell the directors "in advance that he was going to steal", *Jennings & Marsh, Securities Regulation* 997-98 (1977).

Several sentences later, however, he also stated:

> We readily agree that *if all that was here alleged was that UGO had been injured by "internal corporate mismanagement," no federal claim would have been stated. But a parent's looting of a subsidiary with securities outstanding in the hands of the public in a securities transaction is a different matter*; in such cases disclosure or at least the absence of misleading disclosure is required.

*Id.* at 220-221 (emphasis added).

We believe the following line to be drawn by our case. Allegations that a defendant failed to disclose facts material only to support an action for breach of state-law fiduciary duties ordinarily do not state a claim under the federal securities laws. Certainly this is true of allegations of garden-variety mismanagement, such as managers failing to "maximiz[e] value for . . . shareholders," Amended Complaint ¶54, of directors failing "to adequately inform themselves," *id.*, or of managers acting in a generally self-entrenching fashion. But where the remedy of an injunction is needed (and is available under state law) to prevent irreparable injury to the company from willful misconduct of a self-serving nature, disclosure of facts necessary to make other statements not misleading is required where the misleading statements will lull shareholders into forgoing the injunctive remedy.

In *Goldberg*, a parent corporation had transferred its assets and liabilities to a controlled subsidiary with public shareholders in exchange for more stock of the subsidiary. Contemporaneous press releases by the parent painted "an inviting picture . . . of the transaction," 567 F.2d at 214. However, the parent's liabilities exceeded the shareholders' net equity by some $10 million, and the transaction transformed the subsidiary from a financially healthy corporation to a firm impaired by a $3.6 million deficit in current liabilities unable to meet its obligations and finding its assets seized by creditors. *Id.* at 212. Although the parent's control of the subsidiary obviated the legal need for shareholder approval and the disclosure attendant to proxy solicitation, the parent's optimistic press release tended to dispel any suspicion of the transaction. Lack of information about the parent's true financial condition in turn caused the public shareholders of the subsidiary to forgo the opportunity to seek an injunction under state law to prevent irreparable injury to the company.

*Goldberg* also involved out-and-out "looting" and "stealing." Those facts did not require us to distinguish between conduct that is "reasonable" and "unreasonable," or "informed" and "uninformed," distinctions that are the hallmark of state fiduciary law. *Compare Maldonado*, 597 F.2d at 796

(criticizing use of Section 14(a) to redress mismanagement and breaches of fiduciary duty), *with Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 655 (2d Cir. 1979) (distinguishing *Maldonado* in light of "allegations of a cover-up of massive bribes and of kickbacks to directors"), *cert. denied*, 445 U.S. 951 (1980). There is no allegation in the present case of willful misconduct of a self-serving nature that called for injunctive relief lest Pay'n Save's shareholders be irreparably harmed. At best, plaintiff alleges that the directors failed to maximize the return to shareholders, and thus his claims are not actionable under Sections 10(b), 14(a) or 14(e).

This conclusion does not dispose completely of the federal claims in Count II, however, because some of the nondisclosure allegations go beyond descriptions of ordinary breaches of fiduciary duties. Specifically, paragraph "fifty-sixth" of the amended complaint alleges that

> The [Offer to Purchase and related documents] and the 1984 Proxy Statement were materially false and misleading in:
>
> • • •
>
> (2) Stating that the Stroums' Shares issued in the Schucks acquisition, were "valued at approximately $70 million" without disclosing the material fact that the Acquisition Price was equivalent to $25 per share.
>
> (3) Failing to disclose the interrelationship of Bean's [management's] Directors as alleged in Paragraph SEVENTH hereof, and in burying their identity in Annex G at the end of the Offer to Purchase.

Amended Complaint ¶56 (emphasis omitted). In determining whether these claims were properly dismissed under Rule 12(b)(6), we may of course refer to the Offer to Purchase and the 1984 Proxy Statement, which were annexed to defendants' motion to dismiss and are documents that are integral to plaintiff's claims. *See Furman v. Cirrito*, 828 F.2d 898, 900 (2d Cir. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 593 (1969); *id.* § 1364, at 668-73.

With regard to the allegations in subparagraph (2), the Offer to Purchase states in clear language that in January 1984, Pay'n Save bought Schuck's Auto Supply by issuing the Stroums 2,799,014 shares of Pay'n Save stock, and that under the terms of the exchange these shares were worth $70 million. The omission of the $25-per-share figure is not material in light of the fact that dividing the number of shares into $70 million would disclose a price of $25.01 per share. The defendants' failure to perform this calculation for investors cannot be said to have "significantly altered the 'total mix' of information" available to reasonable investors, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), and thus does not constitute actionable nondisclosure. *See Datatab*, 722 F.2d at 5 (no further disclosure required where "conclusion obvious to anyone conversant with elementary mathematics").

Moreover, the only possible relevance of the per-share value of the stock issued to the Stroums would be to illumine for investors the possible motives of the Stroums in demanding a $25 per share price. Even assuming that a motive other than profit maximizing was relevant, the circumstances were amply disclosed. For example, immediately after describing the terms of the acquisition of Schuck's Auto Supply from the Stroums for shares expected to be worth $70 million, the Offer to Purchase states that "[a]fter issuance on January 27, 1984, however, such Shares [the shares issued to the Stroums] had a quoted value in the over-the-counter market of $56,680,034." Offer to Purchase at 3. That the Stroums might have been upset at the performance of their new investment is obvious. Indeed, the Offer to Purchase understandably points out that "differences over the management of the Company . . . developed after the closing of the transaction." *Id.* An explicit statement that the Stroums, pursuant to the fully-disclosed Settlement Agreement with the Trumps, effectively received the $25 per share they originally expected to receive in the Schuck's transaction, simply would not add anything material to the facts otherwise disclosed.

We turn now to subparagraph (3), which alleges first that the defendants failed to disclose the information described in

paragraph "seventh" of the amended complaint, namely various social and professional relationships among the officers and directors of Pay'n Save. These include, for example, the alleged facts that Raymond C. Swanson, a director and Secretary of Pay'n Save, was a member of a law firm that represented Pay'n Save; that some of the directors were also co-directors of another company; and that three of the directors had known M. Lamont Bean, the Chairman and Chief Executive Officer of Pay'n Save, socially for many years. *See* Amended Complaint ¶7. Such trivia, however, is immaterial as a matter of law, especially in light of the extensive disclosure of management and director stock ownership and the terms of management's participation in the leveraged buy-out. Finally, the other allegation in subparagraph (3) — that the defendants violated their disclosure obligations by "burying" the identity of the directors in Annex G to the Offer to Purchase — is frivolous as a matter of law. *See Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 267 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).

3. *The RICO Claim*

The district court dismissed plaintiff's RICO claim on the ground that the alleged racketeering acts "were simply a series of events necessary to achieve a single objective, namely to take the company private," *Field v. Trump*, 661 F. Supp. at 535, and therefore did not establish a pattern under RICO. The plaintiff correctly argues that this legal conclusion is inconsistent with our decision in *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). However, the defendants correctly respond that the result reached by the district court — dismissal — is entirely consistent with our decisions in cases such as *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), which hold essentially that a scheme "carried out 'in pursuit of a single short-lived goal' " does not establish a RICO enterprise. *Beauford v. Helmsley*, 843 F.2d 103, 109 (2d Cir. 1988) (quoting *Creative Bath Prods., Inc. v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1988)), *reh'g in banc granted* (Apr. 13, 1988). Nevertheless, because we have recently decided to rehear *Beauford* in banc "to clarify Second Circuit law," 843

F.2d at 109, we will affirm on a different ground. Because we have found that plaintiff has not stated a valid claim that the Offer to Purchase or 1984 Proxy Statement were materially misleading, it follows that the complaint does not allege securities fraud or mail fraud for the purposes of establishing a pattern of racketerring activity under RICO. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 19 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

## CONCLUSION

For the above reasons, the dismissal of Counts II and III of the complaint are affirmed. The dismisal of Count I is reversed. Because the reversal on Count I may restore pendent jurisdiction over the state-law claims in Counts II and IV, the dismissal of those claims is also reversed.

Affirmed in part and reversed in part.

## FOOTNOTES

[1] Whether the "fees and expenses" for which the Trumps paid $900,000 to the Stroums were actually incurred is irrelevant under the "best-price rule." Some or all of those sums were expended in order to obtain a premium for the Stroums, and it would thwart the purposes of Section 14(d)(7) to allow reimbursement. Moreover, we believe the "best-price rule" would be unworkable if offerors were permitted to discriminate among shareholders according to expenses that were not uniformly incurred, such as broker's or attorney's fees.

[2] Defendants have emphasized that "the public shareholders of Pay'n Save ultimately received $23.50 per share, or approximately $5.00 per share in excess of the market value of their shares on the last full trading date prior to the announcement of the proposed tender offer and merger." Appellees' Joint Brief at 2-3. They apparently wish to stress that application of the "best-price rule" where a payment of a premium above the offer to a large shareholder is necessary to consummate the transaction will ultimately work to the deteriment of shareholders generally by decreasing such transactions. This point, however, can be made about the Williams Act generally, *see, e.g., Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 262 (7th Cir. 1986) (citing Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. Law & Econ. 371 (1980)), *rev'd on other grounds*, 107 S. Ct. 1637 (1987), and thus must be addressed to Congress.

[3] Because full relief is available to plaintiff under Section 14(d)(7), we need not address the claim asserted under Rule 10b-13. *Cf. Pryor*, 794 F.2d at 53; *see also Beaumont v. American Can Co.*, 797 F.2d 79, 83-84 (2d Cir. 1986) (expressing doubt that private right of action exists under Rule 10b-13)